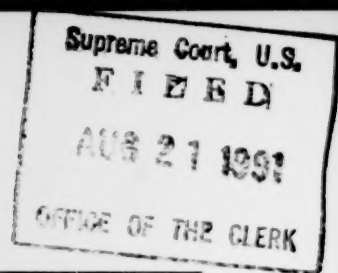


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91 - 323

No. \_\_\_\_\_



In The  
**Supreme Court of the United States**  
October Term, 1991

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JOHN FELDMAN AND HOA ADAMS,  
*Petitioners,*  
v.

THE STATE OF CALIFORNIA,  
*Respondent.*

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Petition For A Writ Of Certiorari To The  
Appellate Department Of The Superior Court Of The  
State Of California For The County Of Orange

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PETITION FOR A WRIT OF CERTIORARI

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BARRY A. FISHER  
Counsel of Record  
ROBERT C. MOEST  
FLEISHMAN, FISHER & MOEST  
2049 Century Park East  
Suite 3160  
Los Angeles, California 90067  
(213) 557-1077  
*Counsel for Petitioners*



## QUESTIONS PRESENTED

1. Whether a California statute that compels charitable solicitors to disclose at the time of solicitation, orally and in writing, voluminous information about the organizations for whom solicitations are sought and about the costs of solicitation violates the free speech and press clauses of the First Amendment.

2. Whether a statute that compels charitable solicitors to disclose several categories of information at the time of solicitation violates the First and Fourteenth Amendments because the information required is so poorly defined, vague and uncertain as to leave the solicitor unsure of what the statute requires.

3. Whether a conviction for theft by false pretenses in the context of charitable solicitation may be obtained on the theory that fund-raising expenses exceeded seventy-five percent of funds received, and were therefore necessarily unreasonable, despite this Court's holding that the First Amendment precludes regulation of charitable solicitors based on the percentage of revenues devoted to fund-raising costs.

**PARTIES TO THE PROCEEDINGS BELOW**

In addition to the parties listed in the caption, James R. Harris and Joseph Ronald Murillo were named as defendants in the trial court, on counts in which neither petitioner was named. They were not parties to this appeal and their convictions are final.



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**PETITION FOR WRIT OF CERTIORARI TO THE  
APPELLATE DEPARTMENT OF THE SUPERIOR  
COURT OF THE STATE OF CALIFORNIA FOR THE  
COUNTY OF ORANGE**

John Feldman and Hoa Adams petition for a writ of certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Orange.

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**OPINION BELOW**

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Orange, App. 1, is not reported.

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**JURISDICTION**

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Orange was entered on April 19, 1991. A petition for rehearing and application for certification to the California Court of Appeal was denied on May 23, 1991. App. 14. Petitioners had no further opportunity to seek review of the judgment in California courts. *See Adams v. Superior Court (People)*, 8 Cal. App. 3d 569, 572, 87 Cal. Rptr. 667, 669 (1970); Cal. R. Ct. 62, 63. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. The Fourteenth Amendment to the United States Constitution, section 1, provides, in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

3. Portions of the California Business & Professions Code are contained at App. 19-22.

4. California Penal Code section 484 provides, in part: "(a) Every person who shall . . . by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . is guilty of theft."

5. California Penal Code section 487 provides, in part: "Grand theft is theft committed in any of the following cases: (1) When the money . . . taken is of a value exceeding four hundred (\$400) dollars."

6. California Penal Code section 488 provides: "Theft in other cases is petty theft."

7. California Penal Code section 166 provides, in part: "Every person guilty of any contempt of Court, of either of the following kinds, is guilty of a misdemeanor: . . . (4) Willful disobedience of any process or order lawfully issued by any Court."



## STATEMENT

The petitioners, John Feldman and Hoa Adams, operated a professional fund raising business that contracted with a number of non-profit organizations to solicit funds by telephone.

In 1985, the Orange County, California, district attorney sought an injunction against them, requiring them, *inter alia*, to comply with a California charitable solicitation statute mandating disclosure of information in eight categories as part of an oral solicitation for funds.<sup>1</sup> That statute requires telephone solicitors to disclose information about their fund-raising efforts in no fewer than eight categories, frequently prescribing the precise words callers must employ. Moreover, at the time the fund-raiser actually receives the donation, he must give the donor a printed card containing the same information.

Criminal charges were filed against Feldman and Adams in 1987. They were charged with a total of 76 counts, including charges of criminal contempt, theft (by fraud and false pretenses), violation of the disclosure requirements of the California Charitable Solicitations statute, and false advertising in violation of California Bus. & Prof. Code § 17500. The Appellate Department of the Superior Court reversed the convictions under section 17500, and those charges are not before this Court.

Eleven trial witnesses testified that they received telephonic solicitations for charitable contributions and that the caller failed to provide information in one or

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<sup>1</sup> The injunction was modified in 1986, and appears at App. 15-18.

more of four categories, as required by the California Charitable Solicitation Law. *See* Cal. Bus. & Prof. Code §§ 17510.3(a)(1);<sup>2</sup> 17510.3(a)(3)<sup>3</sup>; 17510.3(a)(6)<sup>4</sup>; 17510.3(7).<sup>5</sup> The witnesses further testified that, had the callers told them that less than twenty-five percent of the money received would be disbursed directly to the organizations, the witnesses would not have made a contribution.

According to the prosecutor, the testimony of the donors established not only the allegations concerning failure to comply with the charitable solicitation statute, but also the contempt allegations (because the injunction required compliance with the solicitation statute). On the theft charges, the prosecutor argued (in part) that non-compliance with the statutory disclosure requirements was evidence of a scheme to defraud, and that the high solicitation costs were in themselves evidence of fraud.

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<sup>2</sup> "The name and address of the combined campaign, each organization, or fund on behalf of which all or any part of the money collected will be used for charitable purposes." Cal. Bus. & Prof. Code § 17510.3(a)(1).

<sup>3</sup> "The amount, stated as a percentage of the total gift or purchase price, that will be used for charitable purposes." *Id.* § 17510.3(a)(3).

<sup>4</sup> "The non-tax-exempt status of the organization or fund, if the organization or fund for which the money or funds are being solicited does not have a charitable tax exemption under both federal and state law." *Id.* § 17510.3(a)(6).

<sup>5</sup> "The percentage of the total gift or purchase price which may be deducted as a charitable contribution under both federal and state law. If no portion is so deductible the card shall state that 'This contribution is not tax deductible.'" *Id.* § 17510.3(a)(7).



The jury returned a verdict of guilty on sixty-three of the counts, and non-guilty on the remaining thirteen. On motion for new trial, the trial court granted a new trial on the false advertising and theft counts on the basis that the prosecutor had relied upon the arguably high level of solicitation costs to prove fraud, a theory the trial court found to be precluded by the decision of this Court in *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 847, 104 S. Ct. 2839 (1984).

The order granting new trial was reversed by the Appellate Department of the Superior Court of the State of California for the County of Orange without opinion, and the matter remanded for further proceedings. Petitioners again moved for new trial and to dismiss all charges, relying not only on *Munson* but on *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 108 S. Ct. 2667 (1988) as well. The renewed motions were denied.

Feldman and Adams were both granted probation, Feldman on the condition that he serve eight months in custody, and Adams on the condition that she serve four months. Their sentences were stayed pending appeal.

The decision of the Appellate Department of the Superior Court of the State of California for the County of Orange was filed on April 19, 1991. The court affirmed the convictions for failure to disclose information as required by the charitable solicitation statute, those for contempt, and those for theft, while reversing those for false advertising.

In finding that the disclosure requirements of the California charitable solicitation statute, Cal. Bus. & Prof.

Code § 17510.3-17510.4, did not violate the First Amendment, the court distinguished the North Carolina statute at issue in *Riley* in two respects.

First, the North Carolina statute analyzed in *Riley* required that the disclosures be made by professional solicitors, but not by volunteers, thereby discriminating against small or unpopular charities. The California statute applies to both professionals and volunteers alike. Second, the North Carolina statute required that the disclosures be made at the beginning of solicitation, whereas the statute under consideration requires only that the disclosures be made during the course of the solicitation.

App. 11-12.

A timely petition for rehearing and request that the matter be certified to the next higher appellate court, the California Court of Appeal, were denied on May 23, 1991.

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### REASONS FOR GRANTING THE WRIT

Three times in the 1980's, the court visited issues related to state regulation of charitable solicitation. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 108 S. Ct. 2667 (1988); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 847, 104 S. Ct. 2839 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826 (1980). In each instance, the court emphasized that the solicitation of funds for religious, political, and other noncommercial causes is entitled to full First Amendment protection, whether the solicitation is made by an organization itself or on its behalf by a professional fund-raiser.

*Riley*, 487 U.S. at 790, 108 S. Ct. at 2673 (1988); *Munson*, 467 U.S. at 960, 104 S. Ct. at 2673 (1984); *Schaumburg*, 444 U.S. at 32, 100 S. Ct. 826, 833 (1980).

Petitioners' convictions are the unfortunate product of California's misapplied ingenuity in crafting variations on the regulatory devices struck down in the Court's three recent charitable solicitation cases. Although the court has clearly rejected the shop worn reasons for such regulation, *see, e.g. Riley*, 487 U.S. at 790-91, California has not been deterred from adopting measures that can be explained by no fresher premise.<sup>6</sup>

The specific provisions of Cal. Bus. & Prof. Code § 17510 have not been considered by this court. They are invalid, and the petition should be granted so that the court may thoroughly examine California's approach to charitable regulation. Even more important, this case will serve as a necessary vehicle for further clarifying the court's well-founded antagonism to the unreasonable suppression of charitable fund-raising, no matter what form the regulation may take.

The provisions of Cal. Bus. & Prof. Code § 17510.3 compel all solicitors to publish, by way of a written card

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<sup>6</sup> Indeed, California specifically relied upon grounds rejected by *Munson* and *Riley* for enacting section 17510.3. The legislative findings included the statement, "Many solicitations or sales solicitations for charitable purposed have involved situations where funds are solicited . . . purposes, but an insignificant amount, if any, of the money solicited and collected actually is received by any charity." Moreover, the purposes of the act was "to safeguard the public against fraud, deceit and imposition."

or brochure, information in eight categories. Those who solicit by telephone are required to give the same information orally. While no solicitor should be compelled to solicit funds using a presentation ghost-written by the government, the notion that a telephone solicitor must give the names and addresses of, perhaps, several organizations, a description of the ultimate use to which the money will be put, an analysis of fund-raising costs and a disquisition on tax law, all at the instance of the government, is particularly absurd.

Moreover, the solicitor who is required to give the information may only guess at precisely what disclosure is required. Should he or she guess wrong, criminal penalties ensue. Therefore, the vague disclosure requirements are invalid not only because they interfere with the right of charitable solicitors to decide how to ask for support, but because solicitors who might try to follow the state's requirements have little clue about how those requirements are satisfied.

Petitioners' convictions for common law theft illustrate that after-the-fact prosecution for fraud may carry the same perils as excessive regulation. While the Court has frequently recommended to a state "vigorously enforce[ment of] its anti-fraud laws," *Riley*, 108 S. Ct. at 2679, as an alternative to over-regulation, this case illustrates the risk of casually applying broad common law crimes to presumptively protected speech. The prosecutor argued that the high percentage of receipts retained by petitioners' company was indicative of fraud, and its refusal to disclose the information required by the charitable solicitation statute evidence of a pattern and practice of fraud. Just as those unfounded prejudices cannot

be the basis for legislation, they should not be a basis for a common law fraud conviction.

At its core, California's approach is misdirected in a society with a "profound national commitment," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964), to robust expression. Government has no business dictating speech or erecting unnecessary barriers to speakers. California's citizens can be trusted to think for themselves and to use their own faculties to determine whether to listen and contribute.

# I.

## **CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4, INsofar AS THEY REQUIRE SOLICITORS ORALLY AND IN WRITING TO DIVULGE CERTAIN INFORMATION TO POTENTIAL CONTRIBUTORS.**

California Bus. & Prof. Code § 17510.3(a) requires that those who solicit contributions hand the prospective donor a card or brochure containing information in as many as eight categories. Should the solicitor use the telephone to approach prospective donors, the oral solicitation must "clearly disclose" the information required by § 17510.3, and the solicitor, should he or she succeed in obtaining a donation, must provide the information in writing as well. App. 22.

The information required under the statute includes not only the name and address of the "combined campaign, each organization or fund on behalf of which all or any part of the money collected will be utilized for charitable purposes," *id.* § 17510.3(a)(1), but, in certain cases,

"the manner in which the money collected will be utilized," *id.* § (a)(2), "the amount, stated as a percentage . . . that will be used for charitable purposes," *id.* § (a)(3), the total cost of fund-raising (in certain instances), *id.* § (a)(4), that an audited financial solicitation is available, *id.* § (a)(5), that the organization is or is not tax exempt, *id.* § (a)(6), the portion of the donation that may be deducted, *id.* § (a)(7), and for certain organizations, "the total number of members in the organization and the number of members working or living within the county where the solicitation is being made, and if the solicitation is for advertising, the statewide circulation of the publication in which the solicited ad will appear." *Id.* § (a)(8).

Although *Riley* approved in dictum a disclosure something like that required by section 17510.3(a)(1), *see* 108 S. Ct. at 2679 n.11; *but see id.* at 2861 (Scalia, J., concurring in part and concurring in the judgment) (rejecting footnote 11), the dictum did not extend to the plethora of information required by the California statute. No case has suggested that speech may be compelled to the extent required by California in the context of charitable fund-raising.

For example, by requiring the disclosure of addresses, section 17510.3(a)(1) goes much further than *Riley*, and imposes an awkward and unnecessary impediment to charity's speech. Few people will want to hear about a charity if they have to listen to a litany of street names, post office boxes, office numbers, and ZIP codes and fewer still will be prepared to record the information to make any use of it in the future. Moreover, the provision apparently requires the solicitor to determine, in

advance and at his peril, all the charities that may use raised funds. This may be impossible to do – the soliciting charity may, for example, transfer funds to other organizations the professional solicitor is entirely unaware of – and, in any event, also imposes too strict a regimen on a charity's speech.

The required disclosure of a percentage fund-raising expense clearly violates *Riley*. Moreover, the information required to be disclosed itself derives from inadmissible assumptions.

*Riley* held unconstitutional a "point of solicitation disclosure" requirement indistinguishable for First Amendment purposes from California's. As in *Riley*, the provision "necessarily discriminates against small or unpopular charities" because it applies disproportionately to professional fundraisers. 108 S. Ct. at 2679. Second, the Court pointed out that "if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor . . . hangs up the phone." *Id.* (footnote omitted). Again, precisely the same effects are engendered by section 17510.3(a)(3).

Similarly, the disclosures about tax-exempt status not only require the solicitor to give tax advice that he or she may not be qualified to give, but they lead to the potential for unreasonable discrimination among charities. There is no magical difference for purposes of regulation of solicitation between 501(c)(3) and non-501(c)(3) organizations. There may be many reasons why a group does not seek or cannot obtain a 501(c)(3) designation. Thus,



differential regulation based on that criterion is impermissible. See *Telco Communications, Inc. v. Barry*, 731 F. Supp. 670, 681 (D.N.J. 1990) (statute requiring disclosure of non-tax-exempt status and of percentage of purchase price that may be deducted as a charitable contribution was invalid because it "risk[ed] favoring tax-exempt over non-tax-exempt charities and discouraging professional fundraisers from soliciting on behalf of the latter.").

What California does is regulate the content of the conversation between the solicitor and the potential contributor. No showing has or could be made that the contributor needs state-compelled speech to protect his or her interests. Neither distinction of *Riley* offered by the appellate department suggests that California's compelled disclosure requirements should be upheld when North Carolina's were not.

While it is true that *all* charities must make disclosures under California law, not just those represented by professional solicitors, *see* App. 11, the effect of the compelled disclosure is nevertheless to discriminate against fledgling charities and organizations. The organization structure of established charities may well permit allocation of far lower percentages to fund-raising costs; those organizations large and well established enough to have large pools of volunteers may incur lower fund-raising expenses. If all organizations are required to disclose the same one piece of information (or, in California's case, the same several pieces of information), then the state is in effect skewing the fund-raising process to favor those organizations that possess what the state views as a favorable statistic.



Similarly, the contention that the disclosure required by California may occur at any time during the solicitation does not answer the concern that the state is nevertheless closely regulating a conversation that is presumptively entitled to full constitutional protection.<sup>7</sup> Given the volume of information the state requires, it will undoubtedly have a deleterious effect on the ability to obtain contributions regardless of when the information is furnished.

In the absence of a compelled speech requirement, the solicitation could proceed along one of two paths were the potential contributor to ask about the percentage. On one path the solicitor could state the percentage and then try to convince the potential contributor why the conversation should continue.

On the other path the solicitor could refuse to state the percentage and instead try to convince the potential contributor of its irrelevance, arguing both the other benefits than dollars received by the charity, such as information dissemination and advocacy, and the high overhead cost of professional fund-raising.

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<sup>7</sup> Although the appellate department found that the California statute "requires only that the disclosures be made during the course of the solicitation," App. 11-12, that conclusion appears to be directly at odds with the language of the statute. Section 17510.3(a) begins, "Prior to any solicitation . . . the solicitor . . . shall exhibit to the prospective donor . . . a card" containing certain information. App. 19. Section 17510.4 provides that a telephone solicitation "shall clearly disclose the [same] information," with no modification of the requirement of section 17510.3 that the information be furnished at the beginning.

On both paths the potential contributor has the ultimate control: to just say no, or  $\mp$  with less politesse but at least equal efficacy – to hang up in the caller's ear. See, e.g., *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72, 103 S. Ct. 2875, 2983 (1983) (unwanted mail can be put to "the 'short, though regular, journey from mail box to trash can' "); *Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 1786 (1971) (those offended by a jacket inscription "could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

Rather than allow this decentralization of the decision to speak or listen, California imposes a script, one that itself is misleading and designed to thwart certain charities and their outside professional fundraisers. Efforts in other areas to mandate such speech in this way have been rejected. Cf. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 444, 103 S. Ct. 2481, 2500 (1983) ("[I]t is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."). The same result should follow here.

## II.

**INSOFAR AS CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 REQUIRE SOLICITORS TO MAKE DISCLOSURES TO PROSPECTIVE DONORS, THE SECTIONS ARE INVALID BECAUSE THE DISCLOSURE REQUIREMENTS ARE VAGUE AND UNDULY BURDENSOME.**

Not only are the compelled disclosure requirements a direct infringement of the right of free speech, but they carry the danger that even those who attempt to comply

with them will be found to have done so inadequately. The fear that they might face criminal prosecution after the fact for inadequate disclosure might well chill speech in the first instance.

For example, a solicitor is required by section 17510.3(a)(3) to state the "amount, stated as a percentage of the total gift or purchase prices, that will be used for charitable purposes." The fund-raiser may not be able to calculate the percentage at the time the solicitation is made because the fee may depend on the total amount raised. Even assuming that a fixed and unvarying percentage of the funds raised are disbursed to a charitable organization, is the "amount . . . used for charitable purposes" *limited* to that disbursement? As this court has recognized, "Where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself. Thus, a significant portion of the fund-raiser's 'fee' may well go toward achieving the charity's objectives even though it is not remitted to the charity in cash." *Riley*, 487 U.S. at 798-99, 108 S. Ct. at 2678. But how is a solicitor to allocate the funds received among the various overlapping purposes with any certainty that the fund-raiser's allocation will be acceptable in retrospect to the state?

Thus, the charity faces the prospect that, at any later time, a determination will be made that the requirements had not been met. Just as vague advance registration requirements vest the state with "the *effective* power to grant or deny permission" to engage in expression, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622, 96 S. Ct. 1755, 1761

(1976) (emphasis in the original), the disclosure requirements of section 17510.3 invite the state subsequently to determine that the information given did not comply with the statutory requirements.

In *Hynes*, a canvasser did not need a permit in advance, but was required only to "notify" the police for "purposes of identification." "The citizen is not told what must be set forth in the notice, or what the police will consider sufficient as 'identification.'" *Id.* at 621. Certainly the California requirements are no less vague and subject to abuse than the provision in *Hynes*, see *Sylte v. Metropolitan Gov't*, 493 F. Supp. 313, 319 (M.D. Tenn. 1980) (requirement that applicant give "full statement of character and extent of the charitable work being done by the applicant" held unconstitutionally vague), and the fact that the information must be given to a prospective donor rather than to a government officer is of no constitutional moment.

Because the compelled disclosure requirements of sections 17510.3 and 17510.4 are invalid, certiorari should be granted and the decision of the appellate department reversed and the cause remanded on the counts alleging failure to disclose. The contempt convictions were also based on the failure to furnish information required by section 17510.3, and those convictions must likewise be vacated.<sup>8</sup>

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<sup>8</sup> Under California law, a party subject to an injunction may obtain review of the underlying order by violating it, being adjudged in contempt, and challenging the contempt judgment on appeal. *In re Berry*, 68 Cal.2d 137, 150, 65 Cal. Rptr. 272, 282 (1968); *Mitchell v. Superior Court*, 28 Cal. App. 3d 759, 764, 104 Cal. Rptr. 921, 924 (1972).

## III.

PETITIONERS' THEFT BY FRAUD AND FALSE PRETENSES CONVICTIONS MAY NOT STAND BECAUSE THE PROSECUTOR RELIED ON THE PREMISE, REJECTED BY THIS COURT UNDER THE FIRST AMENDMENT, THAT "EXCESSIVE" FUND-RAISING COSTS AND FAILURE TO SUBMIT TO REGULATIONS THAT COERCE SPEECH IN VIOLATION OF THE FIRST AMENDMENT ARE EVIDENCE OF FRAUD.

While this court has observed that after-the-fact prosecutions for fraud are the constitutionally mandated alternative to prior restraints on speech intended to prevent fraud from occurring, *see, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940); *Riley*, 487 U.S. at 800, 108 S. Ct. at 2679, the fact that petitioners were convicted of theft by false pretenses does not automatically obviate the concerns of *Riley*, *Munson*, and *Schaumburg*. Indeed, as this case illustrates, the same flawed premises that led to the statutes and ordinance invalidated in those three cases can be misused to obtain an after-the-fact conviction for charitable solicitation.

Here, the prosecutor argued repeatedly that petitioners were guilty of fraud because the funds raised were not turned over directly to the charity. For example, she told the jury that,

[T]he defendants used this charitable money held in constructive trust for a number of other purposes including paying 25% to the telephone solicitor, 10% to the runner or collector of the donation, 25% to Mr. Feldman, and in some cases 5% to Hoa T. Adams, an estimated 12% to rent and phone costs.

R.T. 83, l. 27-31.

The trial court granted a new trial on all the fraud counts after *Riley* was decided, because "he believed the jury may have found that high solicitations costs were a basis for fraud." Engrossed settled statement II at 87.<sup>9</sup>

The prosecutor also argued that the failure of petitioners to comply with the disclosure of requirements of Cal. Bus. & Prof. Code §§ 17510.3 and 17510.4 was evidence of fraud. In particular, because no evidence was introduced showing that petitioners made any telephone calls personally, the fact that all solicitors did to comply with the requirements of the solicitation statute was relied upon by the prosecutor as powerful evidence that petitioners entire business was fraudulent.

The prosecutors argument – and hence the fraud convictions themselves – were based on a "fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Munson*, 467 U.S. at 966, 104 S. Ct. at 2852. "It is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity that it is for the charity to engage in that activity itself." *Munson*, 467 U.S. at 967 n. 16, 104 S. Ct. at 2853 n.16. solicitation costs high in relation to the

---

<sup>9</sup> The trial court vacated all fraud convictions, including that for grand theft arising from the relationship between one charity and the petitioner's company. While the prosecutor has argued that the count was not tainted by the errors described in the body of the petition, the trial court correctly perceived that, to the extent any evidence supported the conviction on that count, the jury's consideration of that evidence had been tainted by the prosecutor's sweeping allegations concerning the character of the petitioners, based on the impermissible arguments described above.

amount collected may not be assumed to be the product of fraud. "A number of factors may result to high costs; the most important of these is that charities often are combining solicitations with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment." *Munson*, 467 U.S. at 961, 104 S. Ct. at 2849. Another cause of high costs may be that a charity's cause proves to be "unpopular," *id.* at 967, or that the charity is "just getting operations under way and attempting to fulfill a need that is not met by the organizations," *State v. Events Int'l, Inc.*, 528 A.2d 458 (Me. 1987).

Indeed, the very items listed by the prosecutor – telephone costs, salaries, rent and other expenses – are precisely the kind of expenses associated with the non-fraudulent campaigns described by the Court in *Munson*. If professional fund raisers exempt from advance regulation under *Munson* and *Riley* may nevertheless be prosecuted after the fact for fraud, based on the inferences specifically rejected in those cases, the chilling effect on speech will be the same. "Whether the statute regulated before- or after-the-fact makes little difference in this case." *Munson*, 467 U.S. at 969, 104 S. Ct. at 2839.

Therefore, the writ of certiorari should be granted and the decision of the appellate department affirming the theft convictions reversed.

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**CONCLUSION.**

The petition for writ of certiorari should be granted.

Respectfully submitted,

BARRY A. FISHER

Counsel of Record

ROBERT C. MOEST

FLEISHMAN, FISHER & MOEST

2049 Century Park East

Suite 3160

Los Angeles, California 90067

(213) 557-1077

August 21, 1991



App. 1

ENTERED IN THE REGISTER OF ACTIONS ON APRIL  
19, 1991. GARY L. GRANVILLE, COUNTY CLERK, BY  
KATHY SEAMER, DEPUTY.

APPELLATE DEPARTMENT  
SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ORANGE

|                      |   |                     |
|----------------------|---|---------------------|
| THE PEOPLE OF THE    | ) | CASE NO. AP-6455    |
| STATE OF CALIFORNIA, | ) | CASE NO. AP-6456    |
|                      | ) | CASE NO. AP-6457    |
| Plaintiff and        | ) |                     |
| Respondent,          | ) | JUDGMENT OF APPEAL  |
|                      | ) | from the            |
| v.                   | ) | MUNICIPAL COURT     |
|                      | ) | of the              |
| JOHN FELDMAN AND     | ) | CENTRAL             |
| HOA ADAMS,           | ) | JUDICIAL DISTRICT   |
|                      | ) |                     |
| Defendants and       | ) | HON. RANDELL        |
| Appellants.          | ) | WILKINSON, JUDGE    |
|                      | ) |                     |
|                      | ) | (FILED APR 19 1991) |

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These consolidated matters involve an appeal by defendants from their judgments of conviction after being found guilty by a jury of two counts of grand theft and multiple violations of the following: Penal Code sections 484/488 (petty theft based on false pretenses); Business & Professions Code section 17534 (failure to disclose information in conjunction with charitable solicitations as required by Business & Professions Code sections 17510.3 and 17510.4); Penal Code section 166 (contempt of court, based on violation of a superior court preliminary injunction which mandated compliance with Business & Professions Code sections 17510.3 and 17510.4).

## App. 2

Defendants were prosecuted on the basis that they improperly operated a business which raised funds for certain charitable and non-charitable entities. (Of the entities involved, All American Youth Foundation [AAYF] and LA Stars were charities; Wheelchair Basketball Association [WBA] and J & H Productions were not.) In the course of this operation, defendants, through their employees, allegedly failed to disclose to prospective donors that only a very small percentage of their contribution (if any) would be used for a charitable purpose. Such disclosure is required by Business & Professions Code 17510.3 and 17510.4. In addition, defendants' employees sometimes made affirmative misrepresentations concerning the percentage of the contribution to be used for a charitable purpose. Prospective donors were frequently told that their funds would be used to take children to sports events. However, in some cases, the events never took place.

After a jury trial, defendants were convicted on 63 of the 76 counts directed against them. The court, on its own motion, granted a new trial on the theft counts and the unfair business practices counts. Therefore, defendants were sentenced at that time only on the contempt counts and the counts alleging violation of Business and Professions Code 17534. Defendant Feldman was placed on three years formal probation on condition that he serve 120 days in the county jail on each count, sentences to run concurrently. Adams was placed on probation for three years conditioned upon her serving 30 days in the county jail on each count, sentence to run concurrently.

The People appealed from the order granting the new trial. On 12/27/89, the appellate department reversed the

### App. 3

grant of new trial, and remanded the matter to the municipal court for sentencing on the remaining counts. After the remand, the defendants made a motion for a new trial, which the lower court denied.

Defendants were then sentenced on the remaining counts; Defendant Feldman was sentenced to an additional four months "concurrent to Count 5, but consecutive to any other". Adams received an additional three months under the same terms. Both sentences were stayed pending the appeal. Defendants now appeal from the judgment of conviction.

We first address appellants' contention that they should have been charged with violations of Penal Code section 532d rather than Penal Code 484/488 (petty theft) and Business and Professions Code 17500 (misleading statements).

Where a general statute and a specific statute cover a same criminal act, the defendant is entitled to be charged under the more specific statute. [*In re Williamson* (1954) 43 Cal. 2d 651, 654; *People vs. Swann* (1963) 213 Cal.App.2d 447, 449; *People vs. Gilbert* (1969) 1 Cal.3d 475, 481; *People vs. Bertoldo* (1978) 77 Cal.App.3d 627]. Although in the above-cited cases the general statute has been a felony and the specific statute a misdemeanor, we do not believe that this rule is limited to felony/misdemeanor situations.

Defendants herein contend that they should not have been charged with petty theft (P.C. 484/488), but instead with P.C. 532d, also a misdemeanor. The penalties for

violation of these sections are identical.<sup>1</sup> Appellants contend that they should have been charged with section 532d of the Penal Code rather than petty theft, because the former statute is more specific. Section 532d of the Penal Code provides as follows:

**"[Fraudulent solicitation for charitable, religious or eleemosynary purpose]**

Any person who solicits or attempts to solicit or receives money or property of any kind for a charitable, religious or eleemosynary purpose and who, directly or indirectly, makes, utters or delivers, orally or in writing, an unqualified statement of fact concerning the purpose or organization for which the money or property is solicited or received, or concerning the cost and expense of solicitation or the manner in which the money or property or any part there is to be used, which statement is in fact false and was made, uttered or delivered by such person either willfully and with knowledge of its falsity or negligently without the consideration of those facts which by the use of ordinary care he should have known, is guilty of the misdemeanor. No person shall be convicted for violation of this section unless the statement is in writing or, if oral, unless the making or uttering of it is proven by the testimony of two witnesses. Nothing contained in this section shall be construed to limit the right of any city, county, or city and county to adopt regulations for charitable solicitations which are not in conflict with this section. [1963 ch 2083 section 1.]"

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<sup>1</sup> A maximum of six months in jail and a \$1,000 fine.

Section 484 of the Penal Code provides as follows:

"(a) Every person who shall feloniously steal, take . . . the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . is guilty of theft. . . ."<sup>2</sup>

Appellants contend that the elements of both statutes are identical, with the exception that 532d contains an additional element, that the false pretenses must have occurred with respect to a charitable solicitation. Appellants argue that since the latter statute is more specific, this is the only section with which they could properly have been charged.

However, appellants' contention that they are entitled to be charged under section 532d rather than petty theft, is erroneous. The special statute supplants the general statute only where all the elements of the general statute are contained within the specific one. [*People vs. Weltch* (1978) 84 Cal.App.3d 959, 962, 963] In other words, a violation of a specific statute must necessarily be a violation of the general statute, in order for this rule to apply.

Reliance on the part of the victim is an essential element of the crime of theft by false pretenses. [*People vs. Weltch*, *supra*, at 963] However, reliance is not an element

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<sup>2</sup> When the value of the item taken does not exceed \$400.00, the degree of theft is petty theft. [P.C. section [sic] 487, 488].

of section 532d. The crime set forth in 532d is complete upon a solicitation or even an attempt to solicit, and there is no requirement of reliance on the part of the victim. Where, as here, the general statute contains an additional element, all elements of the general statute are not contained in the specific statute. Therefore, it was not error for the defendant to be charged and convicted under the general statute.

Appellants also contend that it was a violation of the aforementioned rule to charge them with Business & Professions Code 17500 rather than section 532d of the Penal Code. Section 17500 provides as follows:

**"False or misleading statements**

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstances or matter of fact connected with the proposed performance or disposition thereof which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known,

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to be untrue or misleading or for any such person, firm or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intend [sic] not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500) or by both.

Appellant contends that both sections contain the following elements: A false or misleading statement made to an individual in an attempt to have him part with money or property. In addition, section 532d contains an additional element, that of solicitation for a charitable purpose. Since all the elements set forth in 17500 are contained in 532, appellants correctly maintain that they should have been charged under the former section.

We now turn to appellants' major contention: the unconstitutionality of Business and Professions Code sections 17510.3 and 17510.4.

The California statutory scheme regulating charitable solicitation is located in Business and Professions Code section 17510, et seq. The purpose of this legislation is to guard the public against fraud, and to prevent misleading methods of charitable solicitation. [B & P section 17510(b)] Section 17510.3 sets forth eight categories of information which must be disclosed by the individual soliciting the contribution. If the solicitation is accomplished in a face-to-face manner, the solicitor must, prior to the solicitation, give a card to the prospective donor,



## App. 8

and the card must contain the same eight categories of information. If the solicitation is accomplished over the telephone, then section 17510.4 requires that during the conversation, the person initiating the solicitation must disclose the eight categories of information set forth in section 17510.3. In the case of a telephone solicitation, if the gift or sale is subsequently consummated, the solicitor must mail or deliver a charitable purpose card containing the eight categories of information referred to in the previous section. [§17510.4]

The categories of information which must be disclosed are as follows:

"(1) The name and address of the combined campaign, each organization, or fund on behalf of which all or any part of the money collected will be utilized for charitable purposes.

(2) If there is no organization or fund, the manner in which the money collected will be utilized for charitable purposes.

(3) The amount, stated as a percentage of the total gift or purchase price, that will be used for charitable purposes.

(4) If paid fund raisers are paid a set fee rather than a percentage of the total amount raised, the card shall show the total cost that is estimated will be used for direct fundraising expenses.

(5) If the solicitation is not a sale solicitation, the card may state, in place of the amount of fund-raising expenses, that an audited financial statement of such expenses may be obtained by contacting the organization at the address disclosed.



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(6) The non-tax-exempt status of the organization or fund, if the organization or fund for which the money or funds are being solicited does not have a charitable tax exemption under the federal and state law.

(7) The percentage of the total gift or purchase price which may be deducted as a charitable contribution under both federal and state law. If no portion is so deductible the card shall state that "This contribution is not tax deductible."

(8) If the organization making the solicitation represents any nongovernmental organization by any name which includes, but is not limited to, the term "officer," "peace officer," "police," "law enforcement," "reserve officer," "deputy," "California Highway Patrol," "Highway Patrol," or "deputy sheriff," which would reasonably be understood to imply that the organization is composed of law enforcement personnel, the solicitor shall give the total number of members in the organization and the number of members working or living within the county where the solicitation is being made, and if the solicitation is for advertising, the statewide circulation of the publication in which the solicited ad will appear."

Section 17534 provides that a violation of section 17510.3 or 17510.4 is a misdemeanor. In Counts 4, 7, 10, 13, 25, 28, 31, 34, 37, 40, 43, 46, 52, 56, 59, 67, 69, 72, 77, and 82, defendants were charged with violating §17534, due to their failure to disclose certain information required by sections 17510.4. In these counts the defendants allegedly failed to disclose the following: (1) the name and address of the combined campaign each organization or fund on behalf of which all or part of the

money collected would be utilized for charitable purposes; (2) the amount, stated as a percentage of the total gift that would be used for charitable purposes; (3) the non-tax-exempt status of the organization or fund under both state and federal law; (4) the percentage of the total gift which could be deducted as a charitable contribution under both state and federal law.

Counts 3, 56, 59, 62, 65, 72, and 78 alleged that the defendants violated section 17534 by failing to deliver the charitable purpose card required by section 17510.4.

At trial the uncontradicted evidence was that none of these disclosures were made.

In challenging the constitutionality of the above disclosure requirements, appellants rely on the United States Supreme Court case of *Riley vs. National Federation of the Blind of North Carolina* (1988) 487 U.S. 781, 108 S.Ct. 2667. In *Riley*, the court struck down as unconstitutional a North Carolina charitable solicitation statute which required that professional fundraisers (but not volunteers) disclose to potential donors, the average percentage of gross receipts actually turned over to the charities by the fundraiser for all charitable solicitations conducted within the state in the previous twelve months. This disclosure was required to be made prior to the appeal for funds. Since the disclosure was mandated by the statute, the statute was considered to be a content-based regulation of speech which was subject to the strict scrutiny standard of the first amendment. [*Riley*, *supra*, at 2677] The State of North Carolina asserted that it had an important interest in informing the donors how the money they contributed would be spent. In addition to

finding that the requirement was unduly burdensome, the court also found it to be not sufficiently narrowly tailored. The court found that the requirement discriminated unnecessarily against small or unpopular charities which usually rely upon professional fundraisers:

"Moreover, the compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent. First, this provision necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. Yet, the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success. Second, in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hands up the phone. [*Riley*, *supra*, at 2679]

However, *Riley* dealt with the constitutionality of a statute which differed from the California statutes in two important respects. First, the North Carolina statute analyzed in *Riley* required that the disclosures be made by professional solicitors, but not by volunteers, thereby discriminating against small or unpopular charities. The California statute applies to both professionals and volunteers alike. Second, the North Carolina statute required that the disclosures be made at the beginning of solicitation, whereas the statute under consideration requires

only that the disclosures be made during the course of the solicitation. Because of these distinctions, which the *Riley* court dealt with at some length, *Riley* does not affect the constitutionality of the Business and Professions Code sections 17510.3 and 17510.4. We, therefore, affirm the convictions based on violations of these sections.

Several of the contempt counts are based upon the failure of defendants to comply with a superior court injunction compelling the disclosures mandated by the Business and Professions Code. The convictions on these counts were also challenged based on *Riley*. For the identical reason expressed above, we affirm on these counts.

Additionally, appellants have argued that the prosecutor obtained a conviction on an improper basis, through a final argument that contended that high solicitation costs were indications of fraud. Although appellants correctly contend that it is legally improper to make a connection between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent,<sup>3</sup> appellants have failed to provide this court with a record which supports their contention that such an improper argument was presented to the jury.

Appellants also challenge the sufficiency of the evidence with respect to count 16 (grand theft from a charity, All American Youth Foundation, Inc.). While there may have been conflicting evidence with respect to this charge, the inquiry this court must make is limited to the

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<sup>3</sup> [*Secretary of State of Maryland v. Munson* (1984) 467 U.S. 947, 104 S.Ct. 2839; *Riley v. National Federation of the Blind of North Carolina* (1988) 108 S.Ct. 2667]

following question: Could a reasonable trier of fact have found the defendants guilty beyond a reasonable doubt? [*People v. Johnson* (1980) Cal.3d 557] In the present case, the question must be answered in the affirmative.

We, therefore, affirm defendants' conviction on all counts except those involving a violation of Business and Professions Code section 17500. This matter is remanded to the lower court for further proceedings.

Dated this nineteenth day of April, 1991.

/s/ W. F. Rylaarsdam  
WILLIAM F. RYLAARSDAM,  
Acting Presiding Judge

/s/ Donald E. Smallwood  
DONALD E. SMALLWOOD, Judge

/s/ William W. Bedsworth  
WILLIAM W. BEDSWORTH, Judge

ap-6455j  
LTB:sd

---

IN THE SUPERIOR COURT OF THE STATE  
OF CALIFORNIA IN AND FOR THE  
COUNTY OF ORANGE

Dept. APPELLATE

Court convened at \_\_\_ M. May 23, 1991, present HONS.  
D. SMALLWOOD, W. BEDSWORTH and Hon. W.  
RYLAARSDAM, Acting Presiding Judge: Kathy Seamer,  
Deputy Clerk; \_\_\_, Bailiff: \_\_\_, Reporter; and the follow-  
ing proceedings were had:

AP-6455 PEOPLE VS ADAMS c/w  
AP-6456 PEOPLE VS MURILLO c/w  
SP-6457 PEOPLE VS FELDMAN  
(Muni. 87CMO6043)

Petition for Rehearing and Application for Certification  
to the Court of Appeal having been timely filed and the  
Court having considered the Petitions and reviewed the  
record, now rules as follows: The Petitions and each of  
them are hereby denied. ENT. 05-23-91.

MICHAEL R. CAPIZZI, District Attorney, P.O. Box 808,  
Santa Ana, CA 92702 RONALD D. DAVIS, P.O. Box 1536,  
Huntington Beach, CA 92647-1536

CLERKS CERTIFICATE OF MAILING (CCP 1013a). I  
CERTIFY I AM NOT A PARTY TO THIS CAUSE, OVER  
THE AGE 18, AND A COPY OF THIS DOCUMENT WAS  
MAILED FIRST CLASS POSTAGE PREPAID IN A  
SEALED ENVELOPE ADDRESSED AS SHOWN ABOVE,  
MAILING AND EXECUTION \_\_\_ OF \_\_\_ THIS \_\_\_  
CERTIFICATE \_\_\_ OCCURRED ON 05-23-91 AT Santa  
Ana, CALIFORNIA, GARY L. GRANVILLE, CLERK, by:  
Kathy Seamer, Deputy Clerk.

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CECIL HICKS, DISTRICT ATTORNEY  
COUNTY OF ORANGE, STATE OF CALIFORNIA  
PATRICK S. GEARY, DEPUTY-IN-CHARGE  
Major Frauds & Consumer Protection Unit  
GAY GEISER-SANDOVAL, Deputy District Attorney  
700 Civic Center Drive West  
Santa Ana, California 92701  
Telephone: (714) 834-3600

Attorneys for Plaintiff

IN THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ORANGE

|                         |   |                       |
|-------------------------|---|-----------------------|
| THE PEOPLE OF THE       | ) | CASE NO. 47-17-42     |
| STATE OF CALIFORNIA,    | ) |                       |
|                         | ) | PRELIMINARY           |
| Plaintiff,              | ) | INJUNCTION            |
|                         | ) |                       |
| vs.                     | ) | (Filed Oct. 15, 1986) |
|                         | ) |                       |
| JOHN C. FELDMAN and     | ) |                       |
| HOA ADAMS, individually | ) |                       |
| and DBA JOHN & HOA      | ) |                       |
| PRODUCTIONS; CALTEL     | ) |                       |
| PRODUCTIONS, INC.,      | ) |                       |
| JIM HARRIS individually | ) |                       |
| as President of CALTEL  | ) |                       |
| PRODUCTIONS and         | ) |                       |
| DOES 1 through 100,     | ) |                       |
| Inclusive,              | ) |                       |
|                         | ) |                       |
| Defendants.             | ) |                       |

Plaintiff, appearing through its attorney, Cecil Hicks, District Attorney of the County of Orange, Patrick Geary and Gay Geiser-Sandoval, Deputy District Attorneys; and Defendants, John Feldman and Hoa Adams, individually



and doing business as John and Hoa Productions, appearing through their attorney John W. Nelson defendant Jim Harris individually and as President of Caltel Productions, Inc., and Caltel Productions, Inc., appearing by their attorney, William W. Woo:

The Court having considered the matter and good cause appearing therefore:

IT IS ORDERED that during the pendency of this action or until further order of the Court, defendant, their officers, directors managers, agents, employees and representatives and all persons corporations and entities who are acting in concert or in participation with them, or any of them, are enjoined and restrained from directly or indirectly doing any of the following:

A. Violating Sections 17200 and 17500 of the Business and Professions Code or Section 17510 et seq. of the Business and Professions Code by:

1. Failing to make all disclosures required under Section 17510.3 of the Business and Professions Code.
2. Failing to make disclosures required under Section 17510.4 of the Business and Professions Code.
3. Failing to provide a complete accounting of all monies obtained as a result of solicitations made by defendants in the name of any charitable organizations, and in particular Handicapped Youth Games, American Youth Foundation and All Stars Wheelchair Basketball Game, pursuant to Business and Professions Code Section 17510.5.
4. Representing themselves to be "volunteers" or unpaid workers, when, in fact, they are paid.



5. Representing themselves to be anyone other than themselves by using fictitious names and/or fictitious titles to which they are not entitled.
6. Representing themselves to be handicapped unless they are, in fact, handicapped.
7. Representing a charitable organization without that organization's permission.
8. Representing that a particular event will take place in the future, unless that event is, in fact, scheduled.
9. Representing that the monies collected will be used for a particular, stated purpose, unless that representation is true.
10. Representing a charitable organization which does not exist.

B. IT IS FURTHER ORDERED that defendants are enjoined and restrained from divesting themselves of, or alienating or encumbering or in any way disposing of any proceeds from any charitable fundraising activities that were held by them on September 5, 1986. Included in this order are any funds raised by them as of that date that were acquired on behalf of a non-profit mutual benefit corporation, including but not limited to funds acquired and held for the benefit of the Los Angeles Stars wheelchair Basketball Association.

C. Jurisdiction is retained for the purpose of enabling any party to this Preliminary Injunction to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this Stipulation and Preliminary Injunction, for the enforcement of compliance therewith, and for the punishment of violations thereof.

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The Clerk is Ordered to enter this Preliminary Injunction.

DATED: 10/15/86

JAMES L. SMITH

Judge of the  
Superior Court

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California Business & Professions Code § 17510.3 provides, in part:

(a) Prior to any solicitation or sales solicitation for charitable purposes, the solicitor or seller shall exhibit to the prospective donor or purchaser a card entitled "Solicitation or Sale for Charitable Purposes Card." The card shall be signed and dated under penalty of perjury by an individual who is a principal, staff member, or officer of the soliciting organization. The card shall give the name and address of the soliciting organization or the person who signed the card and the name and business address of the paid individual who is doing the actual soliciting.

In lieu of exhibiting a card, the solicitor or seller may distribute during the course of the solicitation any printed material, such as a solicitation brochure, provided such material complies with the standards set forth below, and provided that the solicitor or seller informs the prospective donor or purchaser that such information as required below is contained in the printed material.

Information on the card or printed material shall be presented in at least 10-point type and shall include the following:

(1) The name and address of the combined campaign, each organization, or fund on behalf of which all or any part of the money collected will be utilized for charitable purposes.

(2) If there is no organization or fund, the manner in which the money collected will be utilized for charitable purposes.

(3) The amount, stated as a percentage of the total gift or purchase price, that will be used for charitable purposes.

(4) If paid fund raisers are paid a set fee rather than a percentage of the total amount raised, the card shall show the total cost that is estimated will be used for direct fundraising expenses.

(5) If the solicitation is not a sale solicitation, the card may state, in place of the amount of fundraising expenses, that an audited financial statement of such expenses may be obtained by contacting the organization at the address disclosed.

(6) The non-tax-exempt status of the organization or fund, if the organization or fund for which the money or funds are being solicited does not have a charitable tax exemption under both federal and state law.

(7) The percentage of the total gift or purchase price which may be deducted as a charitable contribution under both federal and state law. If no portion is so deductible the card shall state that "This contribution is not tax deductible."

(8) If the organization making the solicitation represents any nongovernmental organization by any name which includes, but is not limited to, the term "officer," "peace officer," "police," "law enforcement," "reserve officer," "deputy," "California Highway Patrol," "Highway Patrol," or "deputy sheriff," which would reasonably be understood to imply that the organization is composed of law enforcement personnel, the solicitor shall give the total number of members in the organization and the

App. 21

number of members working or living within the county where the solicitation is being made, and if the solicitation is for advertising, the statewide circulation of the publication in which the solicited ad will appear.

\* \* \*

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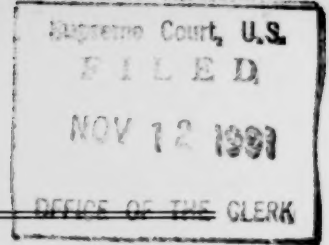
California Business & Professions Code § 17510.4 provides:

If the initial solicitation or sales solicitation is made by radio, television, letter, telephone, or any other means not involving direct personal contact with the person solicited, this solicitation shall clearly disclose the information required by Section 17510.3. This disclosure requirement shall not apply to any radio or television solicitation of 60 seconds or less. If the gift is subsequently made or the sale is subsequently consummated the solicitation or sale for charitable purposes card shall be mailed to or otherwise delivered to the donor, or to the buyer with the item or items purchased.

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2  
No. 91-323



In The  
Supreme Court of the United States  
October Term, 1991

JOHN FELDMAN AND HOA ADAMS,  
*Petitioners,*  
v.

THE STATE OF CALIFORNIA,  
*Respondent.*

On Petition For Writ Of Certiorari To The  
Appellate Department Of The Superior Court Of The  
State Of California For The County of Orange

BRIEF IN RESPONSE TO THE PETITION  
FOR WRIT OF CERTIORARI

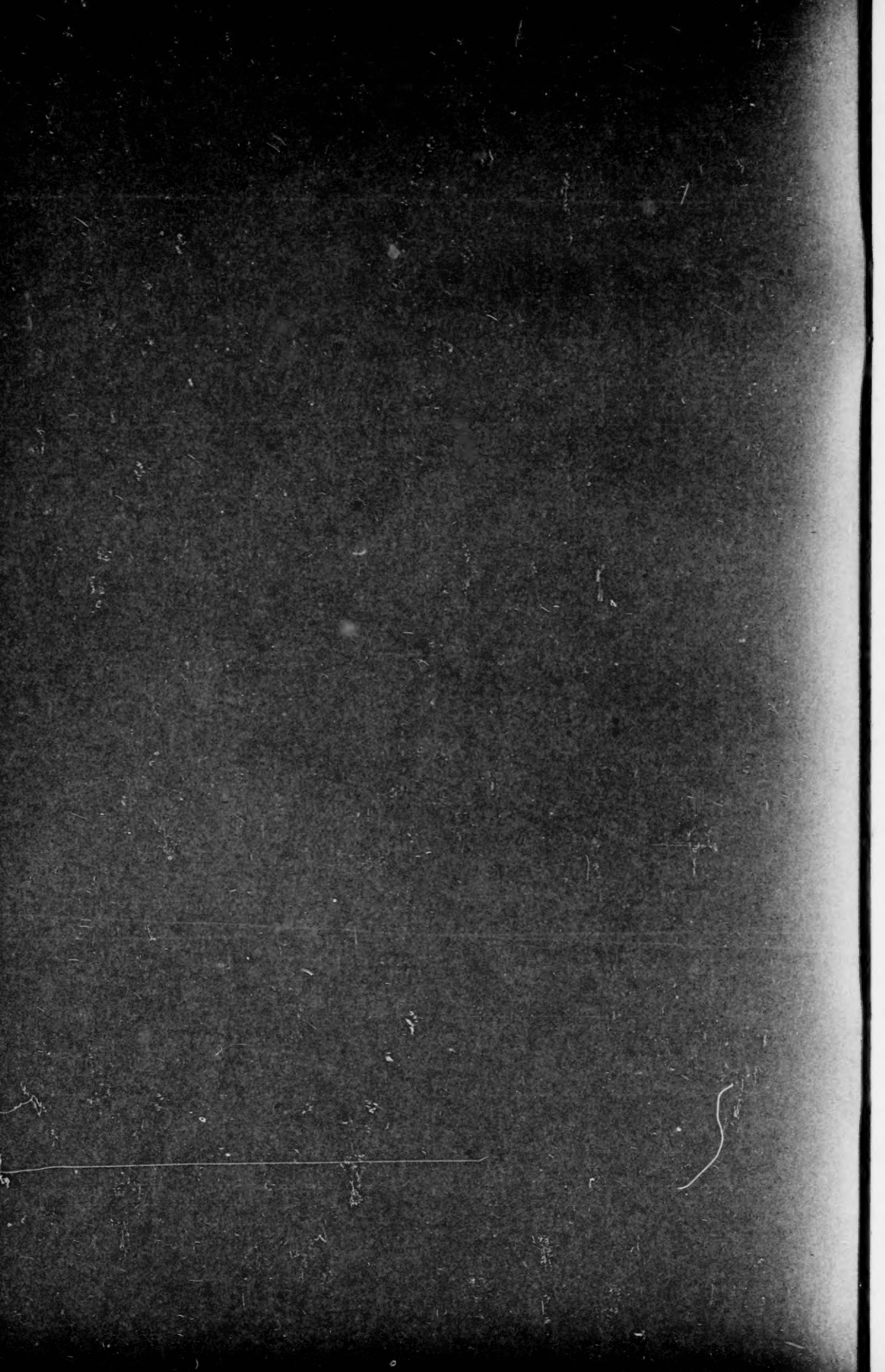
MICHAEL R. CAPIZZI, District Attorney  
County of Orange, State of California  
MAURICE L. EVANS,  
Chief Assistant District Attorney  
BRENT F. ROMNEY,  
Assistant District Attorney

By: E. THOMAS DUNN, JR.  
Deputy District Attorney  
Counsel of Record

Post Office Box 808  
Santa Ana, California 90272  
Telephone: (714) 834-3624

*Attorneys for Respondent*





**COUNTERSTATEMENT OF QUESTIONS  
PRESENTED**

1. WHETHER PETITIONERS' CONVICTIONS FOR THEFT MAY BE ATTACKED ON THE THEORY THAT THE PROSECUTOR MADE AN ALLEGEDLY IMPROPER ARGUMENT WHEN THE RECORD CONTAINS NO EVIDENCE THAT THE PROSECUTOR EVER MADE SUCH AN ARGUMENT.
  - A. WHETHER OVERWHELMING EVIDENCE THAT PETITIONERS ENGAGED IN A PATTERN OF TELLING BLATANT LIES AND MISREPRESENTING MATERIAL FACTS TO CONTRIBUTORS WHO REASONABLY RELIED UPON THEIR STATEMENTS IN DECIDING TO MAKE CONTRIBUTIONS WAS SUFFICIENT TO SUPPORT PETITIONERS' CONVICTIONS FOR THEFT.
  - B. ALTHOUGH THE RECORD BELIES PETITIONERS' CONTENTION THAT SUCH AN ARGUMENT WAS MADE IN THIS CASE, WHETHER A PROSECUTOR IS PRECLUDED BY THE FIRST AMENDMENT FROM TRYING TO CONVINCE A JURY THAT THE AMOUNT OF COSTS, EXPENSES AND FEES RETAINED BY A FUNDRAISER IS EXCESSIVE AND EVIDENCE OF FRAUD WHERE NO STATUTORY LIMITATION ON FUNDRAISING EXPENSES OR A PRESUMPTION OF FRAUD EXISTS TO BIND OR INFLUENCE THE JURY IN ITS FACTUAL DETERMINATION OF WHETHER THEFT BY FALSE PRETENSES OR EMBEZZLEMENT ACTUALLY OCCURRED.

**COUNTERSTATEMENT OF QUESTIONS  
PRESENTED – Continued**

2. WHETHER CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 ARE NARROWLY TAILORED TO ASSIST IN THE PREVENTION OF FRAUD, TO PROMOTE PUBLIC CONFIDENCE IN CHARITIES, AND TO ENSURE THAT THE PUBLIC IS SUFFICIENTLY APPRISED OF INFORMATION VITAL TO THE INFORMED AND INTELLIGENT DISCUSSION OF ISSUES OF PUBLIC CONCERN ENVISIONED BY THE FIRST AMENDMENT.
  
3. WHETHER CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 ARE VAGUE, AMBIGUOUS, OR UNDULY BURDENSOME IN THEIR REQUIREMENTS THAT FUNDRAISING SOLICITORS INFORM POTENTIAL DONORS OF THE FOLLOWING INFORMATION:
  - (A) THE CHARITY'S NAME AND ADDRESS OR, IF THERE IS NO SPECIFIC CHARITABLE ORGANIZATION OR FUND, THE MANNER IN WHICH CONTRIBUTIONS WILL BE USED FOR A CHARITABLE PURPOSE;
  
  - (B) WHAT PERCENTAGE OF THEIR CONTRIBUTIONS WOULD GO TO THE CHARITY FOR WHICH SOLICITATION IS BEING MADE OR THE ESTIMATED FUNDRAISING EXPENSES OF THE PARTICULAR FUNDRAISING CAMPAIGN OR, IN A NON-SALE SOLICITATION, THAT AN AUDITED FINANCIAL STATEMENT OF THE EXPENSES MAY BE OBTAINED BY CONTACTING THE CHARITY OR OTHER ORGANIZATION AT THE ADDRESS DISCLOSED;
  
  - (C) THE NON-TAX-EXEMPT STATUS OF THE CHARITY IF THE ORGANIZATION HAS NO TAX EXEMPTION;

**COUNTERSTATEMENT OF QUESTIONS  
PRESENTED - Continued**

(D) HOW MUCH OF THE CONTRIBUTION IS TAX DEDUCTIBLE, IF ANY;

(E) IN CASES WHERE THE ORGANIZATION FOR WHICH SOLICITATION IS BEING MADE HAS A NAME WHICH IMPLIES A STATE LAW ENFORCEMENT CONNECTION WHICH DOES NOT EXIST, THE NUMBER OF MEMBERS IN THE ORGANIZATION, THE NUMBER OF THOSE MEMBERS WHO LIVE OR WORK IN THE DONOR'S COUNTY AND, IF THE SOLICITATION IS FOR ADVERTISING, THE STATEWIDE CIRCULATION OF THE PUBLICATION IN WHICH THE ADVERTISING WILL APPEAR.

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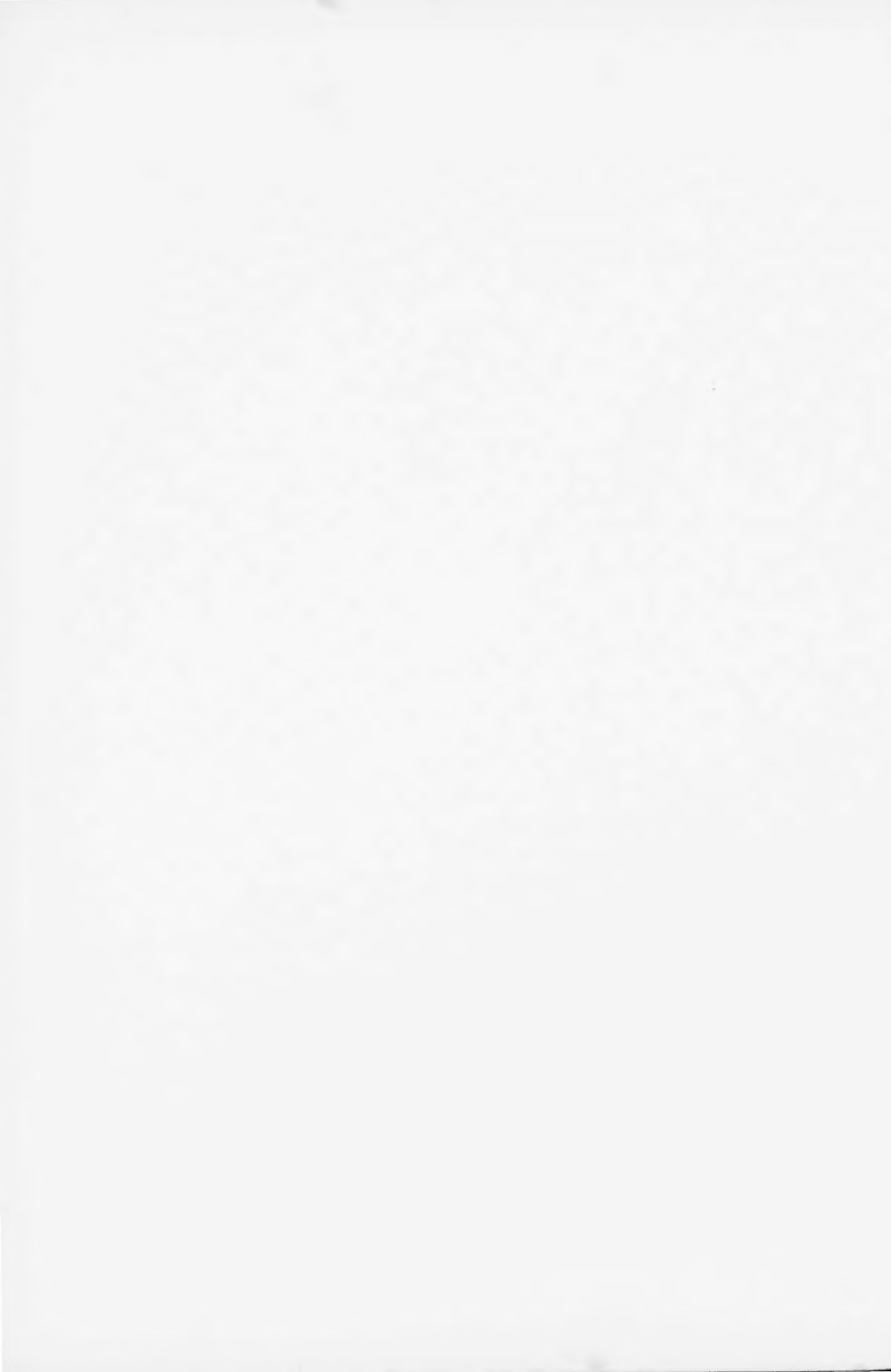
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No. 91-323

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In The  
**Supreme Court of the United States**  
October Term, 1991

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JOHN FELDMAN AND HOA ADAMS,  
*Petitioners,*  
v.

THE STATE OF CALIFORNIA,  
*Respondent.*

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On Petition For Writ Of Certiorari To The  
Appellate Department Of The Superior Court Of The  
State Of California For The County of Orange

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**BRIEF IN RESPONSE TO THE PETITION  
FOR WRIT OF CERTIORARI**

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Pursuant to the Court's request, on behalf of the People of the State of California, Michael R. Capizzi, District Attorney for the County of Orange, California, by E. Thomas Dunn, Jr., Deputy District Attorney, hereby submits the following response to the petition for a writ of certiorari in the above-entitled matter.

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**COUNTERSTATEMENT**

In October 1985, the District Attorney of Orange County, California, filed a civil consumer protection lawsuit against John C. Feldman and Hoa Adams, petitioners

here, to put a stop to the ongoing fraudulent solicitations which petitioners were making, *ostensibly*, on behalf of "charity." As a result of that lawsuit, the District Attorney obtained a preliminary injunction which prohibited Feldman and Adams from lying while soliciting money from the public, from soliciting for non-existent "charities," and from soliciting for fictitious charitable events which were neither held nor scheduled to occur.

On October 15, 1986, the District Attorney obtained a temporary restraining order and a modification of the preliminary injunction. As modified, the preliminary injunction enjoined petitioners from continued violation of California's charitable solicitation laws, from making false statements and representations in connection with their solicitations, and from encumbering or disposing of the funds held by them as of September 5, 1986, which had been obtained as a result of their fundraising activities.

Because petitioners continued to engage in fraudulent activities unabated, ignoring the terms of the injunctions, the restraining order and state law, criminal charges were eventually filed against them in 1987. Petitioners were charged with a total of 76 criminal offenses. The misdemeanor complaint alleged that petitioners not only refused to disclose vital information to prospective donors as required by law, but that they lied by telling donors that 100 percent of contributions would actually go to charity when, in fact, little, or more often, *no* money went to charity; lied by telling donors that they represented charities which, in fact, they did not represent; lied by telling donors that they represented charities which did not even exist; lied by telling donors that

money was needed to take sick children to their "last" sporting event when no sporting event took place or was even contemplated, and made other blatant material misrepresentations of fact in order to obtain other people's money.

Following a trial by jury, on May 11, 1988, petitioners were convicted on sixty-three counts. These convictions fell into the following four categories of misdemeanors: (1) sixteen violations of California Business and Professions Code section 17500 (false advertising)<sup>1</sup>; (2) twenty-four violations of California Business and Professions Code section 17534 (non-compliance with certain mandatory disclosure requirements in connection with solicitations for charity); (3) sixteen theft offenses, including grand theft, petty theft, and attempted petty theft; and (4) seven counts of contempt of court, premised on non-compliance with the preliminary injunction as modified on October 15, 1986.

In Counts 4, 7, 10, 25, 28, 31, 34, 37, 40, 43, 46, 52, 67, 69, 72, 77 and 82, petitioners were convicted of violating Business and Professions Code section 17534, due to their failure to disclose information required by section 17510.3. Specifically, petitioners failed to disclose: (1) the name and address of the charities on whose behalf they were supposedly working; (2) the percentage of the contributions that would be used for a charitable purpose in each fundraising campaign; (3) the tax-exempt status of the charity under state and federal law; and (4) the

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<sup>1</sup> The Appellate Department of the Superior Court reversed the convictions under California Business and Professions Code section 17500, and those charges are not before this Court.

percentage of the donation which could be deducted by the donor as a charitable contribution under state and federal law.

During the trial, twelve witnesses testified that they received telephonic solicitations for charitable contributions from petitioners' employees. In Count 4, the victim was not provided any of the information required by section 17510.3 (E.S.S. 18, 19).<sup>2</sup> In Counts 7, 46, 52 and 72, the only information disclosed to the victims was the name of a charitable organization (E.S.S. 8, 9, 16, 17, 31). The victims in Counts 10 and 82 were told only the solicitor's name and that the contribution would be tax deductible (E.S.S. 12, 14). In Counts 25, 40, 69, and 77, the victims were simply told the name of the person soliciting them and the name of the charitable organization (E.S.S. 7, 15, 24).

The victim in Counts 28, 31 and 34 was told the name of the person calling him and the name of the charitable organization. Although he was never told the tax-exempt status of the "charity," the victim inferred that the organization was tax exempt because of the receipt he received (E.S.S. 42, 43). In Count 37, the victim was told only the solicitor's name (which apparently was a false name preceded by the term "Dr.") and the name of the charitable organization (E.S.S. 2, 67).

In Count 43, the victim was told the caller's name, the name of a charitable organization, and that 85 percent of her money would go specifically for the rehabilitation

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<sup>2</sup> E.S.S. refers to the "Engrossed Settled Statement" of facts submitted by the State and certified true and correct by the trial court.

of handicapped children. Despite these representations, the contract between petitioners and the charity provided that petitioners would receive 25 percent of all contributions "off the top," then expenses would be paid, and the charity would get what remained. Moreover, no handicapped child was ever "rehabilitated as a result of the victim's (or any other victim's) donation (E.S.S. 3).

The victim in Count 67 was told the caller's name, the name of the charitable organization, and that 100 percent of her donation would go directly "to the children" (E.S.S. 4-7). The solicitor also told the donor that \$100 would pay for six children to attend a "wheelchair basketball tournament" at Anaheim Stadium when no such tournament was ever held, contemplated or possible (E.S.S. 6, 25). In addition, the solicitor failed to give the address of the charitable organization and completely misrepresented the terms of the contract between petitioners and the charity – the same contract outlined above with regard to Count 43.

Petitioners were also convicted in Counts 3, 56, 59, 62, 65, 73 and 78 of violating Business and Professions Code section 17534 by failing to deliver the charitable purpose card required by section 17510.4 following successful telephone solicitations. In each of these counts, the victim was contacted by one of the petitioners' telephone solicitors and agreed to contribute money to the alleged charitable cause. The solicitor then sent someone to pick up the contributions. The victims, when contacted, received a receipt for their contributions; however, the receipts contained none of the disclosures required by section 17510.4. Moreover, the "charitable purpose card" required by section 17510.4 was never provided.

In Counts 2, 6, 9, 12, 16, 29, 35, 38, 41, 47, 53, 60, 63, 66, 75 and 80, petitioners were convicted of various theft violations. All of the victims testified that, had they known less than 25 percent of their contributions would actually go to charity, they would not have donated any money.

Counts 2, 6, 9 and 12 relate to solicitations for the "Wheelchair Basketball Association." When soliciting these funds, the solicitors told the victims that there would be a wheelchair basketball game held on either April 25 or April 26 of 1987 at Cerritos College in Cerritos, California (E.S.S. 50-51). In fact, no event ever took place (E.S.S. 20, 25, 28).

As to Count 2, the victim was told by the solicitor that he was a volunteer when in fact he was paid. The solicitor also told the victim that the solicitation was being made in connection with the All American Youth Foundation when, in fact, it was not (E.S.S. 51). As to Count 6, the victim was led to believe that he was contributing to "Flying Wheels Basketball" and was told he had given to this organization "for many years" (E.S.S. 18).

In Count 9, the victim was explicitly told that the petitioners *were* "Flying Wheels Basketball," a charity she had given to in the past (E.S.S. 18). In reality, petitioners had no affiliation with "Flying Wheels Basketball," never represented "Flying Wheels Basketball," and never had a right to represent "Flying Wheels Basketball." The company victimized in Count 12 was told its donation to the "Wheelchair Basketball Association" would be tax

deductible when, in fact, the Wheelchair Basketball Association was a business and hence "donations" were not tax deductible (E.S.S. 14; Trial Exhibit 2C).

Count 16 alleged petitioners committed grand theft from the All American Youth Foundation between July 1, 1986, and March 18, 1987. During this time, petitioners solicited money in the name of the All American Youth Foundation (E.S.S. 60, 61); however, they had neither a contract to solicit for the Foundation nor permission to use its name (E.S.S. 52, 53).

Counts 38, 41 and 44 involved solicitations made to a Ms. Briney. In Count 41, Ms. Briney was told her money would pay for tickets to take children to see "Disneyland on Ice" (E.S.S. 2-4). However, as petitioners stipulated at trial, no tickets for Disneyland on Ice were ever purchased (Trial Exhibit 1). As to Count 44, petitioners lied to Ms. Briney about what percentage of her contribution would go to charity. She was told 85 percent of her donation would go to the charitable cause (E.S.S. 3-4) when, in fact, only a minuscule fraction of her donation went to charity (E.S.S. 57-62).

Counts 53 and 75 were based mainly on the solicitor's misrepresentations about the intended use of the victims' donations. The victim in Count 53 was told that his \$70 donation would take 30 children from Children's Hospital to a baseball game. He was also told that the 30 children would receive a lunch and transportation to the game (E.S.S. 16). In Count 75, the victim was told his contribution would be used to send handicapped children to a baseball game and that \$30 would provide lunch, transportation, and tickets to the game for two



children plus the financial support necessary for adult supervision (E.S.S. 8).

Each of these two victims stated he would not have made a donation had the solicitor not lied to him about taking sick and helpless children to baseball games. Petitioners' fraud was further revealed by expert testimony which demonstrated that the percentage of funds that actually went to charity was so small that it could not have begun to pay for the tickets or the food the solicitors told the victims their contributions would cover (E.S.S. 8-9, 16-17, 57-62).

As regards Count 53, all of the tickets to baseball games provided to the Children's Hospital were donated by the Los Angeles Rams football team and were not paid for by any of the victim's contributions (E.S.S. 16-17, 57). Even though the victim's monies were not needed to purchase any of the tickets, petitioners failed even to provide the children with food or transportation, despite the heart-rending representations they had made to their contributors (E.S.S. 16-17, 32-33).

After the petitioners' jury trial, the court, on its own motion, granted a new trial on the theft counts and the unfair business practice counts. Petitioners were sentenced at that time only on the contempt counts and the counts alleging violations of Business and Professions Code 17534. Petitioner Feldman was placed on three years formal probation on condition that he serve 120 days in the county jail on each count, sentences to run concurrently. Petitioner Adams was placed on probation for three years conditioned upon her serving 30 days in

the county jail on each count, sentences to run concurrently.

The People appealed from the order granting the new trial. On December 27, 1989, the Appellate Department of the Superior Court reversed and remanded for resentencing. Subsequently, petitioners made a second motion for new trial which was denied. The trial court then sentenced petitioners on the reinstated counts; however, the sentences were stayed pending disposition of petitioners' appeal.

The opinion of the Appellate Department of the Superior Court here at issue before this Honorable Court was filed on April 19, 1991. The Appellate Department affirmed petitioners' convictions for failure to disclose information as required by the charitable solicitation statutes, for contempt, and for theft, while reversing those for false advertising.

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## ARGUMENT

### I. PETITIONERS' CONVICTIONS ON SIXTEEN COUNTS OF THEFT ARE WITHOUT CONSTITUTIONAL INFIRMITY.

#### A. CONTRARY TO PETITIONERS' CLAIM IN THE PETITION FOR CERTIORARI, THE RECORD DOES NOT DEMONSTRATE THE PROSECUTOR RELIED ON THE PREMISE THAT PETITIONERS' EXCESSIVE FUNDRAISING COSTS AND FAILURE TO SUBMIT TO REGULATIONS WERE EVIDENCE OF FRAUD.

In the third of their three arguments, petitioners contend their convictions under Penal Code sections 484, 487

and 488<sup>3</sup> should be reversed because the prosecutor's argument to the jury violated their First Amendment rights. Petitioners insist that the prosecutor improperly argued that their high solicitation costs and consistent failures to comply with the disclosure requirements of California Business and Professions Code sections 17510.3 and 17510.4 were evidence of fraud.

Preliminarily, respondent invites this Honorable Court's attention to the fact that, when petitioners made this same argument in the court below, the three judge panel of the Superior Court Appellate Department concluded, correctly, that the record is devoid of support for petitioners' contention (Pet., at App. 12). Because petitioners' argument is not supported by the record, it is not properly before this Court.

However, even if the record *did* demonstrate the prosecutor argued petitioners' "excessive fund-raising cost and failure to submit to regulations" was "evidence of fraud," such an argument would have been completely proper under the First Amendment to the United States Constitution. None of the cases cited by petitioners holds to the contrary, as will appear below.

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<sup>3</sup> In California, the generalized crime of theft described in Penal Code Section 484 includes the crimes of obtaining money by false pretenses and embezzlement. Penal Code section 487 defines "grand theft," and section 488 specifies that theft in all other cases is "petty theft."

**B. CALIFORNIA STATUTES DEALING WITH CHARITABLE SOLICITATIONS NEITHER LIMIT THE AMOUNT OF CONTRIBUTIONS WHICH CAN BE USED TO PAY FUND-RAISING EXPENSES NOR DO THEY UTILIZE A PERCENTAGE-BASED TEST FOR FRAUD IN VIOLATION OF THE FIRST AMENDMENT.**

Petitioners rely primarily upon *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), and *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), for the proposition that, when a prosecutor tries to convince a jury that a high percentage of fundraising costs is evidence of fraud, the prosecutor violates the defendant's First Amendment rights. But *Riley* and *Munson* say nothing of the kind.

In *Munson*, *supra*, a Maryland statute forbade a charitable organization from "pay[ing] or agree[ing] to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of . . . fund-raising activity." *Id.*, 467 U.S. at 950, n. 2. Where the amount of expenses to be paid exceeded 25 percent, the statute subjected both the fundraiser and the charity to criminal liability. *Ibid.*

In *Riley*, *supra*, a North Carolina statute prohibited professional fundraisers from charging "unreasonable" or "excessive" fees, which the statute defined with a three-tier schedule. While a fee of up to 20 percent was deemed "reasonable" under the statute, a fee exceeding 35 percent was *presumed* to be unreasonable, thus placing on the solicitor the burden of rebutting the presumption. *Id.*, 487 U.S. at 784-785.

In *Munson*, the majority recognized "that there is no necessary connection between fraud and high solicitation and other administrative costs" and held that a percentage limitation, even where the statute provides for exceptions, is not a "narrowly drawn regulatio[n] designed to serve [the state's] interes[t] without unnecessarily interfering with First Amendment freedoms." *Munson*, 467 U.S. at 961, quoting from *Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 637 (1980).

In *Riley*, the majority held that the fact a professional fundraiser's fee exceeds the percentage of contributions a statute defines as "reasonable" does not necessarily prove that the fundraiser committed fraud. Accordingly, the North Carolina statute which made evidence of expenses exceeding the specified percentage presumptive proof of fraud was said to violate the First Amendment.

*California's statutes*, in stark contrast to the statutes at issue in *Munson* and *Riley*, do not utilize a percentage-based test for fraud. On the contrary, California Business and Professions Code section 17510.3 states simply that a prospective donor must be told "[t]he amount [of the contribution], stated as a percentage of the total gift or purchase price, that will be used for charitable purposes." The statute does not make any particular percentage fraudulent; it states no "reasonable" or "unreasonable" fee; it contains no limitation; it imposes no presumption.

Thus, where a State's attorney prosecutes an individual for theft offenses under California Penal Code sections 484, et seq., and endeavors to persuade jurors that a certain percentage of expenses is excessive and fraudulent, the prosecutor's argument simply offers the jury an

opportunity to resolve a question of fact, the resolution of which is not tied to or based upon the dictates of any statute. In such cases, the prosecutor merely proposes an argument, not unlike most arguments that address questions of intent or other mental states, which relies upon circumstantial evidence to prove an element of the offense at issue. To say this presents a constitutional question, much less a constitutional dilemma, strains credulity.

### C. SUMMARY OF THE PROSECUTOR'S ARGUMENTS IN SUPPORT OF THE THEFT ALLEGATIONS.

The Engrossed Settled Statement reflects that the prosecutor argued that theft was shown based upon two separate theories:

"One theory was theft by false pretenses. That theory was that through misrepresentations or misstatements, the victims were told that their money was going to take a certain amount of children to an event, and that did not happen. Rather, 20% or less went to a 'charitable purpose.' In most instances, 10% or less actually went to take handicapped children to an event. In the instances of the Wheelchair Basketball Association theft counts, no money ever went to take handicapped children to the wheelchair basketball game because the wheelchair basketball game was never held." (E.S.S. 83, 84.)

As the record shows, the prosecutor argued that petitioners made affirmative misrepresentations to the

donors concerning the intended use of their contributions. These fraudulent misrepresentations fully supported the charges of theft by false pretenses. The evidence at trial demonstrated that petitioners were wholly unconcerned with conforming their conduct to the requirements of California Business and Professions Code sections 17510.3 and 17510.4. The only reason they made the representations that they *did* make was to induce unsuspecting individuals to part with their money.

The State's attorney also argued that petitioners committed theft by embezzlement. Using this theory, the prosecutor explained that, when the victims responded to petitioners' affirmative representations by contributing, the donors, in essence, were granting petitioners the right to use their money solely for the purposes proposed in petitioners' representations. Thus, a constructive trust resulted which entitled petitioners to use the funds received for the sole purpose of helping the handicapped, taking children to charitable events, providing drug education in the schools, or whatever the particular representation was when the money was given.

However, the defendants used this charitable money held in constructive trust for a number of other purposes not revealed to the donors. These included, at minimum, paying 25% to the telephone solicitor, 10% to the donation "runner,"<sup>4</sup> 25% to petitioner Feldman,<sup>5</sup> and

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<sup>4</sup> The "runner" was the person sent to pick up the contribution following a successful telephone solicitation.

<sup>5</sup> Petitioner Adams lived with Petitioner Feldman. Feldman apparently took care of Petitioner Adams's financial needs.

approximately 12% for rent and phone costs. At trial, each victim testified that petitioners did not have permission to use the money given them for any purpose other than that which was specified and explained in the original phone solicitation. The prosecutor argued, accordingly, that petitioners committed theft by embezzlement, an argument the jury was free to accept or reject.<sup>6</sup>

**II. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 ARE NARROWLY TAILORED TO THE STATE'S COMPELLING INTEREST IN PREVENTING FRAUD AND ENSURING THE DISSEMINATION OF VITAL INFORMATION TO THE PUBLIC IN A MANNER CONSISTENT WITH THE CORE PURPOSE OF THE FIRST AMENDMENT.**

Petitioners were convicted of seventeen violations of Business and Professions Code section 17534,<sup>7</sup> due to their failures to disclose information required by section 17510.3. In seven other counts, petitioners were convicted of violating section 17534 for failing to deliver the

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<sup>6</sup> The overwhelming evidence of a consistent pattern of misrepresentation by petitioners which appears in the trial record is outlined in the "Counterstatement" of the case, above. Accordingly, it will not be repeated here. Suffice it to say that the facts adduced at trial demonstrated that petitioners' convictions were based upon the blatant lies told by petitioners to prospective donors, which false statements were not compelled by any California statute.

<sup>7</sup> Section 17534 provides, "Any person, firm, corporation, partnership or association or any employee or agent thereof who violates this chapter is guilty of a misdemeanor."



charitable purpose card required by section 17510.4. Petitioners appear to assert that each category of information in section 17510.3 is unconstitutional under *Riley, supra*. However, *Riley* fails to support such a sweeping generalization.

**A. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17510.3, SUBDIVISION (a)(1), IS CONSTITUTIONAL UNDER FOOTNOTE 11 OF THIS COURT'S *RILEY* DECISION.**

The majority in *Riley* noted that an unchallenged portion of the North Carolina disclosure law required professional fundraisers to disclose their professional status to potential donors, thereby giving notice that at least a portion of the money contributed would be retained. *Riley, supra*, 487 U.S. at 799. The Court further observed in footnote 11 that the North Carolina Act required the fundraiser to disclose his or her employer's name and address.

Having recited these provisions of the North Carolina statute, the majority cautioned, "[N]othing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." *Id.*, at n. 11.

The North Carolina statute requiring the fundraiser to disclose his or her employer's name and address is virtually identical to the provision stated in California

Business and Professions Code section 17510.3, subdivision (a)(1), which petitioners argue is unconstitutional under *Riley*. Subdivision (a)(1) of section 17510.3 requires the solicitor to provide the name and address of the combined campaign, each organization, or fund on behalf of which all or any part of the money collected will be utilized for charitable purposes. Clearly, under footnote 11 of *Riley*, this subdivision is constitutionally valid.

Because section 17510.3, subdivision (a)(1), does not offend the First Amendment, even were petitioners' argument correct that the remainder of section 17510.3 is unconstitutional, petitioners' convictions should not be affected. Sufficient evidence exists in the record to support each conviction on the basis of violations of subdivision (a)(1) alone. Consequently, even assuming, without conceding, that subdivisions (a)(2) through (a)(8) of section 17510.3 are unconstitutional, the convictions on Counts 4, 7, 10, 25, 28, 31, 34, 37, 40, 43, 46, 52, 67, 69, 72, 77 and 82 should be sustained.<sup>8</sup>

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<sup>8</sup> Again, the specific evidence applicable to each count is outlined in the "Counterstatement" of the case, above, and, for the sake of brevity, it will not be repeated here.

**B. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3, SUBDIVISIONS (a)(2) THROUGH (a)(8), AND 17510.4 ARE ALSO CONSTITUTIONAL BECAUSE THEY ARE NARROWLY TAILORED TO ASSIST IN THE PREVENTION OF FRAUD, TO PROMOTE PUBLIC CONFIDENCE IN CHARITIES, AND TO ENSURE THAT THE PUBLIC IS SUFFICIENTLY APPRISED OF INFORMATION VITAL TO THE INFORMED AND INTELLIGENT PUBLIC DISCUSSION ENVISIONED BY THE FIRST AMENDMENT.**

In *Riley, supra*, the majority of this Court struck down a North Carolina statute requiring solicitors to disclose the "average of the percentage of gross receipts actually paid" to *all* charities for which the fundraiser had acted during the twelve previous months. *Id.*, 487 U.S. at 795; North Carolina General Statutes section 131C-16.1 (1986). Such a provision was obviously burdensome and overbroad. It required information completely irrelevant to the solicitation occurring at the time of the disclosure, without regard to the unique aspects of each separate solicitation. *Id.*, 487 U.S. at 800, n. 12. Accordingly, the majority of this Court concluded the statute was not narrowly tailored to achieve its stated goal. Understandably.

At the same time, however, this Court acknowledged that "[t]he interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Id.*, 487 U.S. at 792. California Business and Professions Code sections 17510.3 and 17510.4 are such narrowly drawn regulations.

All that California has done is required solicitors to inform each prospective donor about the specific arrangement they have with the particular charity for whom they are then soliciting. No perusal of voluminous records from the past twelve months is required. No tabulation and mathematical averaging are called for. Only a simple recitation of the terms of the agreement between the fundraiser and the one specific charity for whom that fundraiser is soliciting need be revealed. On the other hand, if no firm arrangement has been consummated (as unlikely as that may be), the statute merely requires that an estimate be given.

The provision of this and the other basic information required by section 17510.3 enables a prospective donor to make an informed decision as to whether or not a donation would be a wise expenditure of the donor's sometimes meager funds and gives the donor information that can be verified for its truthfulness and accuracy. At the same time, information required by section 17510.3 includes facts which are easily ascertainable by the solicitor and which can be recited in a matter of seconds. In fact, in door-to-door solicitations, they need not be recited at all so long as the pre-printed card is provided. The intrusion on speech is minimal.

As California Business and Professions Code section 17510 explains,<sup>9</sup> sections 17510.3 and 17510.4 were enacted to address an insidious problem plaguing the people of California. Pervasive fraud had been perpetrated on the public by unscrupulous fundraisers

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<sup>9</sup> The pertinent provisions of section 17510 are appended to this response in Appendix 1.

intent on "making a buck" at anyone's expense. Affirmative state action was essential to protect the public's interest in fair solicitations. Accordingly, California endeavored to create a climate in which misrepresentations would be discouraged.

In respondent's view, the public's interests are advanced by requiring petitioners to state in a concise and unburdensome way who they are and what they want other people's money *for*. Discriminating donors may then verify the information they have been provided and make contributions which go to assist true charities and not someone's commercial enterprise.<sup>10</sup> California's statutes provide a prudent and measured approach to the problem which the state believes will withstand constitutional scrutiny.

**III. CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17510.3 AND 17510.4 CLEARLY COMMUNICATE WHAT VERBAL AND WRITTEN DISCLOSURES ARE NECESSARY FOR COMPLIANCE WITH THE STATUTE. NEITHER IS VAGUE, AMBIGUOUS, OR UNDULY BURDENSOME.**

Petitioners argue that California Business and Professions Code sections 17510.3 and 17510.4 are constitutionally invalid because the statutes' disclosure requirements are vague. A statute is void for vagueness when men of common intelligence must necessarily guess

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<sup>10</sup> The speech of such a commercial enterprise, incidentally, ought to be analyzed as "commercial speech." The only "public issue" contemplated by petitioners' speech concerns fraud in the charitable fundraising industry - a discussion which respondent believes is entitled to minimal, if any, First Amendment protection. *Munson, supra*, 467 U.S. at 966.

at the statute's meaning. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A statute can be void for vagueness when individuals contemplating a communication cannot determine whether the communication will subject them to the operation of the law. Sections 17510.3 and 17510.4 are not vague on their face, nor are they vague as applied to petitioners.

On its face, section 17510.4 clearly says that telephone solicitors must disclose the information specified in section 17510.3. Thus, a telephone solicitor does not need to be a brain surgeon<sup>11</sup> to comprehend that, when he makes telephone solicitations, he must provide that information. How much more clear could a statute be?

Section 17510.3, subdivisions (a)(1) through (a)(8), detail the information the solicitor must disclose to the potential donor. This information is simple to understand, clear and unambiguous. However, petitioners claim that section 17510.3, subdivision (a)(3), is vague in its requirement that solicitors disclose the "amount, stated as a percentage of the total gift or purchase price, that will be used for charitable purposes." Certainly this requirement is not vague. It seems clear to respondent that it means the solicitor must tell the donor what percentage of the donation will go to charity.

Petitioners also argue, however, that the solicitor may not be able to calculate the percentage at the time the solicitation is made because the fee may depend on the total amount raised. This argument is wholly without merit.

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<sup>11</sup> Even though one solicitor at least represented himself to be a doctor. . . .

It is not unreasonable to assume that, prior to *any* authorized solicitation, an agreement will be reached between the solicitor and the charity which determines what the solicitor will be paid and allowed to spend on the campaign. Even so, were there to be no agreement, and a charity were to permit its fundraiser to give the charity whatever the fundraiser decided it could part with,<sup>12</sup> unencumbered by any concern for the charitable reason behind the contribution, the statute, on its face, does not preclude the solicitor from informing the donor that no precise agreement as to a percentage has been reached. As a matter of fact, contrary to the argument submitted in the petition for certiorari, Business and Professions Code section 17510.3, subdivision (a)(4), provides an alternative to subdivision (a)(3) which *expressly* permits solicitors to state an "estimated" cost for the fundraising activities *in lieu* of any percentage figure.

In any case, petitioners are arguing about a danger that has never materialized – about what, in petitioners' fertile imaginations, *might* conceivably happen. This is nothing but rank speculation. In every count alleged in the complaint where petitioners actually *had* the right to represent a legitimate charity (and there were a few), there was either an agreement or a written contract which expressly specified the sums the charity would receive. These arrangements could have been communicated to the prospective donors. They were not. On the contrary, when people asked how much of their donations would

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<sup>12</sup> A charity so loose in its affairs would probably deserve whatever paltry sum its solicitor deigned to devolve upon it.

actually go to charity, the solicitors were simply trained to say with confidence, "100 percent!" (R.S.S. 199.)

As for the burden imposed by California's charitable solicitation statutes, that "burden" is minimal. The only burden the statute imposes is the burden of providing basic information that can be verified by the individuals solicited.<sup>13</sup> The statute requires only that, in most cases, three statements be made so that donors will have the opportunity to assure themselves, through *their own* subsequent efforts and investigation, that their money is being used in the manner they intended.<sup>14</sup>

Thus, these statutes do not unduly burden the interests protected by the First Amendment. In contrast to the statutes at issue in *Munson* and *Riley*, they do not attempt to punish either charities or solicitors when fundraising expenses exceed what the government arbitrarily decides is excessive. Rather, they facilitate the flow of vital information in a narrowly tailored fashion consistent with the teachings of this Court's precedent. California Business and Professions Code sections 17510.3 and 17510.4

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<sup>13</sup> Petitioners grossly overstate their case when they insist that California has provided a "script" for them to follow. Although respondent realizes there is no evidentiary value in it, its counsel, without practice, can fully state the information required by sections 17510.3 and 17510.4 politely in less than 30 seconds.

<sup>14</sup> A solicitor's failure to carry the "burden" of telling the truth in connection with representations made to a prospective donor is primarily subject to prosecution for theft by false pretenses. The thrust of Business and Professions Code sections 17510.3 and 17510.4 is simply to ensure the provision of the information.



*advance* the interests which the First Amendment was designed to protect by ensuring that the public discussion is an *informed* discussion in which truth is ascertainable.

Were charitable fundraisers not required to provide the basic information required in sections 17510.3 and 17510.4, individuals succumbing to solicitors' sometimes heart-rending, emotional tactics would often have no *material* representations upon which to build the kind of case for fraud that this Court encouraged States vigorously to prosecute in *Riley, supra*, 487 U.S. at 795. Surely the First Amendment was not intended to be a shield to protect blatant fraud or, much less, a sword used to carve a swath out from under the unsuspecting and uninitiated member of the public.<sup>15</sup>

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## CONCLUSION

Accordingly, respondent urges this Court to deny certiorari as to the questions presented in petitioners' second and third issue statements. With regard to the first issue phrased in the petition, if this Court believes the California statute is *not* narrowly tailored under the *Riley* decision to achieve the compelling interests California here asserts, then respondent invites this Honorable Court to grant certiorari limited to this specific issue as a

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<sup>15</sup> If the provision of such precise and limited information creates a "burden" on a person set on practicing treachery upon the innocent and unsophisticated, as Lennon and McCartney once suggested in a song, "Let It Be."

vehicle for reconsidering or distinguishing *Riley*. Otherwise, the petition should be denied.

DATED this 12th day of November, 1991.

Respectfully submitted,

MICHAEL R. CAPIZZI, District Attorney  
County of Orange, State of California

MAURICE L. EVANS,  
Chief Assistant District Attorney

BRENT F. ROMNEY,  
Assistant District Attorney

BY: E. THOMAS DUNN, JR.  
Deputy District Attorney  
Counsel of Record

Post Office Box 808  
Santa Ana, California 92702  
Telephone: (714) 834-3624

*Attorneys for Respondent*



## APPENDIX 1

California Business and Professions Code section 17510 provides:

"(a) The Legislature finds that there exists in the area of solicitations and sales solicitations for charitable purposes a condition which has worked fraud, deceit and imposition upon the people of the state which existing legal remedies are inadequate to correct. Many solicitations for charitable purposes have involved situations where funds are solicited from the citizens of this state for charitable purposes, but an insignificant amount, if any, of the money solicited and collected actually is received by any charity. The charitable solicitation industry has a significant impact upon the well-being of the people of this state. The provisions of this article relating to solicitations and sale solicitations for charitable purposes are, therefore, necessary for the public welfare.

(b) The Legislature declares that the purpose of this article is to safeguard the public against fraud, deceit and imposition, and to foster and encourage fair solicitations and sales solicitations for charitable purposes, wherein the person from whom the money is being solicited will know what portion of the money will actually be utilized for charitable purposes. This article will promote legitimate solicitations and sales solicitations for charitable purposes and restrict harmful solicitation methods, thus the people of this state will not be misled into giving solicitors a substantial amount of money which may not in fact be used for charitable purposes."

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